

90-486

No. _____

Supreme Court, U.S.

FILED

SEP 17 1990

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

LOWELL SAYLOR, et al

Petitioners,

v.

STATE OF OREGON, OREGON DEPARTMENT OF
WATER RESOURCES, and MICHAEL F. LADD,
WATERMASTER, DISTRICT 5, OF THE
STATE OF OREGON WATER RESOURCES
DEPARTMENT,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
STATE OF OREGON

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Counsel for Petitioners



QUESTION PRESENTED FOR REVIEW

Where plaintiffs bring an action in state court under 42 U.S.C. § 1983 for a violation of Fifth and Fourteenth Amendment rights, where the § 1983 federal claim is substantial, and the state court finds the § 1983 federal claim "unnecessary" because parallel relief is available under state law, are plaintiffs "prevailing parties" entitled to attorney fees under 42 U.S.C. § 1988?

PARTIES

Petitioners are Lowell Saylor, Oregon Trail Ranches, Inc., and Alfalfa Acres, Inc.

Respondents are the State of Oregon, Oregon Department of Water Resources, and Michael F. Ladd, Watermaster, District 5, of the State of Oregon Water Resources Department.

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IN THE
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Petitioners,

v.

STATE OF OREGON, OREGON DEPARTMENT OF
WATER RESOURCES, and MICHAEL F. LADD,
WATERMASTER, DISTRICT 5, OF THE
STATE OF OREGON WATER RESOURCES
DEPARTMENT,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
STATE OF OREGON

Petitioners respectfully pray that a
writ of certiorari issue to review the
decision of the Oregon Court of Appeals

entered March 14, 1990. This decision was denied review by the Supreme Court of the State of Oregon on June 19, 1990.

OPINIONS BELOW

The Oregon Supreme Court's denial of review is reported at 310 Or. 122 (1990). The decision of the Oregon Court of Appeals is reported at 100 Or. App. 745, 788 P.2d 494 (1990).

JURISDICTION

In accordance with 28 U.S.C. § 1257(a), this petition prays for certiorari review of a judgment by the highest court of a State in which the decision could be had. The Oregon Court of Appeals issued its decision below on March 14, 1990. The Oregon Supreme Court denied review on June 19, 1990. This petition is therefore timely pursuant to the provisions of Rule 13.1 of the Rules

of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS AND
STATUTES INVOLVED

Article VI of the United States Constitution provides, in pertinent part as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

United States Constitution, Article VI, Paragraph 2.

The Fifth Amendment to the United States Constitution provides, in pertinent part:

No person shall be * * * deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1983 of Title 42 of the United States Code provides, in pertinent part as follows:

Every person who, under color of any statute . . . of any State * * * subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

Section 1988 of Title 42 of the United States Code provides, in pertinent part:

In any action or proceeding to enforce a provision of [Section] * * * 1983 * * * of this title,

the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys fees as part of the costs.

42 U.S.C. § 1988.

STATEMENT OF THE CASE

This is an action for violation of plaintiffs' substantive right to the enjoyment and use of irrigation water, a property right vested in plaintiffs under the terms of a 1916 Water Rights Decree. On February 11, 1988, plaintiffs called upon the state to deliver irrigation water to their lands in accordance with the decree; the state refused. App. 23.

Plaintiffs subsequently filed this action in the state trial court in April, 1988, alleging a civil rights claim under 42 U.S.C. § 1983, and asking for

declaratory and injunctive relief. After conducting a hearing, the trial court ruled in favor of the plaintiffs and ordered the state to deliver water to plaintiffs in May-June, 1988 to make up for the water the state had denied to them in February. App. 25.

Having prevailed on the merits, plaintiffs moved for and were awarded attorney fees under 42 U.S.C. § 1988. App. 15-17. The trial court's analysis in granting plaintiffs' motion for attorney fees contains the following summary of relevant facts:

In this action plaintiffs were already injured by the action of the Watermaster. They were told under paragraph 7 of the distribution plan that their accumulated water rights would not be recognized until they signed the plan. This restriction was imposed after the starting date for plaintiffs' accumulated water

rights and drought conditions exacerbated the situation. Thus, plaintiffs were in fact denied their accumulated water rights from January 19, 1988 until March 21, 1988."

App. 16-17.

The state appealed the trial court judgment to the Oregon Court of Appeals, contending that the trial court had erroneously awarded attorney fees because plaintiffs federal claims were not substantial.^[1]

The Oregon Court of Appeals reversed. Citing and relying on Oregon State Police Officers Ass'n v. State of

[1] For purposes of this inquiry, a federal claim is "substantial" unless it is "obviously frivolous" or "absolutely devoid of merit" or clearly foreclosed by prior controlling authority. E.g. *Hagans v. Lavine*, 415 U.S. 528, 536-38, 39 L.Ed.2d 577, 587-88, 94 S.Ct. 1372, 1379 (1974). Plaintiffs' federal claims were sufficiently substantial to prevail in the trial court.

Oregon, 308 Or. 531, 783 P.2d 7, (1989),
petition for cert. filed, April 11, 1990,
the Oregon Court of Appeals held that
because plaintiffs were entitled to the
injunctive relief they sought under state
law, their invocation of 42 U.S.C. § 1983
was "unnecessary"; consequently, the
trial court's award of attorneys fees was
reversed. App. 9-10. Plaintiffs
petitioned for review in the Oregon
Supreme Court. That tribunal denied
review on June 19, 1990. App. 4.

REASONS FOR GRANTING PETITION

I. This case should be consolidated
and reviewed together with another
pending case which presents the same
question.

The issue presented in this petition
is identical to the question raised in

another case that is before this Court, Oregon State Police Ass'n v. State of Oregon, 308 Or. 531, 783 P.2d 7 (1989), petition for cert. filed, April 11, 1990. Indeed, the decision of the court below was based solely on a perfunctory citation to the Oregon State Police Ass'n case.

Because of the identity of the issues in the two cases, it is respectfully submitted that the immediate case should be consolidated and reviewed on certiorari together with the Oregon State Police Ass'n case.

II. The Oregon Court of Appeals has misconstrued 42 U.S.C. § 1983 and § 1988 and its decision conflicts with decisions of this Court, federal courts of appeals, and every other state appellate court that has addressed the question.

A. Introduction.

The Court of Appeals held:

"Because respondents were entitled to the relief that they sought under state law, their invocation of 42 U.S.C. § 1983 was unnecessary. Accordingly, the trial court erred in awarding respondents attorney fees under 42 U.S.C. § 1983."

This ruling effectively nullifies § 1988 because almost every conceivable kind of civil rights case is independently

cognizable under state law on non-civil rights grounds.[2]

Based on the Supremacy Clause of the United States Constitution, however, attorney fees under § 1988 are an integral part of the remedy in any 42 U.S.C. § 1983 case "whether the action is brought in federal or state court." Maine v. Thiboutot, 448 U.S. 1, 11, 65 L.Ed.2d 555, 563, 100 S.Ct. 2502, 2508 (1980). Therefore, the ruling that

[2] The following cases are illustrations of valid § 1983 claims that are accompanied by an independent right to relief under state law. City of Riverside v. Rivera, 477 U.S. 561 (1986) (unreasonable search and seizure; common law battery); Carreras v. City of Anaheim, 768 F.2d 1039 (9th Cir. 1985) (first amendment free speech case; independent right to relief under state constitution); Seals v. Quarterly County Court, 562 F.2d 390 (6th Cir. 1977) (equal protection voting rights case; parallel state claim); Gibbs v. Town of Frisco City, 626 F.2d 1218 (5th Cir. 1980) (unconstitutional deprivation of life; statutory wrongful death).

plaintiffs' § 1983 claim was "unnecessary" is plainly in error.

B. The Oregon Court of Appeals decision below conflicts with the decisions of this Court.

There is no question plaintiffs properly filed federal constitutional claims in state court,^[3] nor that they are "prevailing parties" within the meaning of § 1988. E.g., Hensley v. Eckerhart, 461 U.S. 424, 76 L.Ed.2d 40, 103 S.Ct. 1933 (1983). Plaintiffs obtained all the relief they sought when the trial court granted a preliminary injunction ordering the state to restore plaintiffs' property interest in their irrigation water.

[3] Howlett v. Rose, 496 U.S. ___, 110 L.Ed.2d 332 (1990).

In Mahe v. Gagne, 448 U.S. 122, 132 (1980), this Court held that a plaintiff is the prevailing party for purposes of an award of attorney fees under § 1988 even when the plaintiff prevails "on a wholly statutory, non civil rights claim pendent to a substantive constitutional claim," 448 U.S. at 132, provided that the winning claim shares a common nucleus of operative fact with the substantial federal constitutional claim. Id.

In Mahe, this Court grounded its holding on clear expressions of legislative intent, construing the legislative history of § 1988 as follows:

"The legislative history makes it clear that Congress intended fees to be awarded where a pendant constitutional claim is involved, even if the statutory

claim on which the plaintiff prevailed is one for which fees cannot be awarded under the Act. The Report of the Committee on the Judiciary of the House of Representatives accompanying HR 15460, a bill substantially identical to the Senate Bill that was finally enacted, stated: 'To the extent a plaintiff joins a claim under one of the statutes enumerated in HR 15460 with a claim that does not allow attorney fees, the plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees.

448 U.S. at 132, n. 15. [4]

The present case falls squarely within the rule of Maher. Plaintiff

[4] The legislative history quoted above is followed by a reference to *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). *Gibbs* stands for the rule that the federal courts have jurisdiction to entertain pendent state law causes of action when they are properly joined with federal claims. Thus, by citing *Gibbs*, Congress necessarily envisioned that attorney fees would be available where the civil rights claimant is afforded relief on independent state law grounds.

pleaded and proved a substantive constitutional claim. Indeed, the trial court expressly held that plaintiffs' substantive constitutional rights were violated and the state of Oregon does not seriously contend otherwise. Therefore, having prevailed on the merits, plaintiffs were entitled to recover their attorney fees under the rule this Court announced in Maher.

In a similar vein, in Smith v. Robinson, 468 U.S. 922 (1984), this Court said:

"As the legislative history illustrates and as this Court has recognized, § 1988 is a broad grant of authority to courts to award attorneys fees to plaintiffs seeking to vindicate federal constitutional and statutory rights. (citing cases) * * * Congress did not intend to have that authority extinguished by the fact that the case was settled or resolved

on a non-constitutional ground.

468 U.S. at 1006.

C. The legislative history of Section 1988 supports this Court's prior decisions and requires an award of attorney fees in this case.

Congress enacted § 1988 to provide suitable legal representation to all victims of civil rights violations, recognizing that such claimants otherwise would be unable to present their cases in court. Riverside v. Rivera, 477 U.S. 561, 576 (1986). In Riverside, this Court found that Section 1988 embodies the following policy considerations:

1. Plaintiffs who suffer civil rights violations have little or no money with which to hire counsel. 477 U.S. at 576.

2. Many civil rights cases yield no award or only a small award of damages from which

attorneys fees can be paid. Id. at 577.

3. Civil rights litigation serves the public interest insofar as it tends to deter official misconduct. Id. at 578-79.

These legislative objectives are utterly thwarted by the Oregon Court of Appeals' decision in this case. Plaintiff Lowell Saylor is a struggling farmer who faced major crop losses in a year of serious drought conditions. The judicial remedy he sought was equitable in nature, leaving no award of damages to defray the cost of legal representation. He acted as a "private attorney general," vindicating the rights of all the water users in the subject irrigation system. His case stands at the very heart of § 1988. He is entitled

to recover fees under that statute based on the clear mandate of Congress.[5]

Since a potential right to relief under state law now means that § 1988 fees will not be available in Oregon state courts, potential plaintiffs will either be unable to secure legal representation in state courts, or be forced to seek federal judicial protection. This is precisely the problem which Congress sought to remedy

[5] Anticipating *Maier v. Gagne* by three years, Judge Burns held in *Southeast Legal Defense Group v. Adams*, 436 F.Supp. 891, 895 (D. Or. 1977), *aff'd.*, 657 F.2d 1118, 1123 (9th Cir. 1981), that "it seems manifestly unfair to penalize plaintiffs who couple their constitutional claims with meritorious statutory claims and thereby facilitate the federal policy of avoiding unnecessary constitutional decisions. To deny such plaintiffs the attorney fees to which they might otherwise be entitled frustrates rather than promotes the policy of [§ 1988]."

when it amended § 1988 in 1976. Maine v. Thiboutot, supra, 448 U.S. 11, n. 12.

D. The Oregon Court of Appeals' decision below conflicts with the decisions of the federal courts of appeals.

Every reported federal appellate court decision that has considered the issue has held, without exception, that the Maher principle applies where the plaintiff has prevailed on a state law claim that was joined to a substantial federal claim:

"* * * When the plaintiff in a civil rights action prevails on a pendent state claim based on a common nucleus of operative fact with a substantial federal claim, fees may be awarded under § 1988."

Carreras v. City of Anaheim, 768 F.2d 1039, 1050 (9th Cir. 1985) (ordinance regulating solicitation of donations

violated California Constitution; federal constitutional claims not reached; § 1988 fees awarded).[6]

[6] Accord, *Seaway Drive-in, Inc. v. Township of Clay*, 791 F.2d 447, 450-52 (6th Cir.), cert. den., 479 U.S. 884, 93 L.Ed.2d 251, 107 S.Ct. 274 (1986), (drive-in theatre ordinance voided on state statutory grounds; fees awarded on § 1983 constitutional claims not reached); *Exeter-West Greenwich Regional School v. Pontarelli*, 788 F.2d 47, 52 (1st Cir. 1986) (§ 1983 claim dismissed as moot when state court on certification from federal district court, granted plaintiff's relief under state law; § 1988 fees awarded); *Lund v. Affleck*, 587 F.2d 75, 76-77 (1st Cir. 1978) (State welfare policy invalidated under Social Security Act; fees awarded on concurrent § 1983 claims); *State of New York v. 11 Cornwell Company*, 718 F.2d 22, 25 n. 3 (2d Cir. 1983) (en banc) (plaintiff prevails on state law claim, awarded fees on undecided substantial § 1983 claim); *Williams v. Thomas*, 692 F.2d 1032, 1036 (5th Cir. 1982) cert. den. sub. nom. *Dallas County, Texas v. Williams*, 462 U.S. 1133, 77 L.Ed.2d 1369, 103 S.Ct. 3115, (1983) (plaintiff prevailed on state tort claim; § 1988 fees awarded on undecided § 1983 due process claim); *Kimbrough v. Arkansas Activities Association*, 574 F.2d 423, 426-27 (8th Cir. 1978) (plaintiff prevailed on construction of state athletic rule; § 1988 fees awarded on undecided civil rights claims). See also, *Milwe v. Cavuoto*, 653 F.2d 80, 84 (2d Cir. 1981) (plaintiff prevails on state court claims, with nominal damages on (continued)

In Seals v. Quarterly County Court, 562 F.2d 390 (6th Cir. 1977), the Sixth Circuit addressed a voting rights claim which had been brought under § 1983 as well as under state law. Although the case was resolved exclusively under state law, 562 F.2d at 392, the court held that the § 1983 claim did not disappear "because relief is rendered on an alternative state law ground." 562 F.2d at 394. The court further stated:

"Congress clearly has the power in such circumstances to authorize attorneys fees as a matter of federal law, and it equally clearly has done so."

Id.

§ 1983 claim; attorney fees awarded, quoting Maher, supra.)

E. The Oregon Court of Appeals' position below is in conflict with the decisions of all the other state appellate courts that have addressed the question.

Except for the Oregon Supreme Court's plainly unconstitutional ruling in Oregon State Police Ass'n v. State of Oregon, supra, upon which the Oregon Court of Appeals relied, every state appellate decision has held that § 1988 attorney fees should be awarded under the circumstances presented in this case.[7]

[7] Davis v. Everett, 443 S.2d 1232, 1235-36 (Ala. 1983) (plaintiff prevails on state constitutional claim for liquor license; equal protection claim under § 1983 not reached; fees awarded under § 1988); Best v. California Apprenticeship Council, 240 Cal.Rptr. 1 (Cal.App. 1987) (state statutory construction avoids First Amendment § 1983 claim; § 1988 fees awarded); Gumbhir v. Kansas State Board of Pharmacy, 231 (continued)

As the Massachusetts Supreme
Judicial Court said in Stratos v.
Department of Public Welfare, 387 Mass.
312, 439 N.E.2d 778 (1982):

Kan. 507, 646 P.2d 1078, 1086 (1982) (principle of Maher quoted, but fees denied for lack of common nucleus of operative fact and federal claims found to lack merit); County Exec., Prince George's County v. Doe, 300 Md. 445, 479 A.2d 352, 358 (1984) (plaintiff prevails on state ground; § 1988 fees awarded on § 1983 claim not reached); Draper v. Town Clerk of Greenfield, 425 N.E.2d 333, 339 (Mass. 1981) (plaintiff prevails on state statutory interpretation, state and federal constitutional questions avoided; § 1988 fees awarded); Bung's Bar & Grille, Inc. v. Florence Tp, 206 NJ Super. 482, 502 A.2d 1198, 1216-1218 (1985) (plaintiff prevails on state grounds; § 1988 fees awarded on § 1983 claim not reached); Young v. Toia, 66 A.D.2d 377, 413 N.Y. Supp. 2d, 530, 531-32 (1979) (plaintiff prevails on state claim; § 1988 fees awarded on federal claim not reached); Johnson v. Blum, 58 N.Y.2d 454, 461, N.Y. Supp.2d 782, 448 N.E.2d 449 (1983); Doe v. Cuddy, 21 Ohio App. 3d 370, 487 N.E.2d 914, 916-917 (1985) (state welfare regulation void under Ohio statute; § 1983 constitutional claims not reached; § 1988 fees awarded); Intern. Ass'n. of Machinists v. Affleck, 504 A.2d 468, 470-71 (R.I. 1986); City of Fort Gates v. Cathey, 665 S.W.2d 586 (Texas App. 1984) (plaintiff prevails on state claim; federal § 1983 claims not reached; § 1988 fees awarded).

"Section 1983 provides an independent remedy for violation of rights protected by federal law. If such a right is at issue, the Section 1983 remedy is available, even if the State has also provided a means of obtaining relief. (citing cases) * * * [T]he fee incentive is equally useful and necessary whether the right in question is secured by federal law alone, or by state law as well. Therefore, the fact that a plaintiff claiming relief under Section 1983 could have obtained relief solely by means of a state remedy -- even a "routine" one -- did not foreclose a fee award."

439 N.E.2d at 783 (citing Maher v. Gagne, supra, at n. 15).

CONCLUSION

The answer to the question posed in this case will have broad effects on the enforcement of civil rights in federal and state courts, on federal dockets and on the balance between state and federal judicial power. This court should

restore the balance disturbed by the decision below.

For all of the foregoing reasons, the Writ of Certiorari should be granted and the Oregon Court of Appeals' decision should be reversed. The case should be remanded for reinstatement of the attorney fee awards below and for an award of fees on appeal and on this petition for certiorari.

Respectfully submitted,

DUNN, CARNEY, ALLEN,
HIGGINS & TONGUE

By:

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APPENDIX TO
Petition for Writ of Certiorari
to the Court of Appeals of the
State of Oregon

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IN THE COURT OF APPEALS
OF THE STATE OF OREGON

SAYLOR, LOWELL ET AL)	
OREGON TRAIL RANCHES,)	ORDER DENYING
INC., ALFALFA ACRES,	)	REVIEW
INC.,)	
	)	CA A50953
Plaintiffs	)	SC S37073
Respondents.)	
)	
v.)	
)	
WATER RESOURCES)	
DEPT., LADD,)	
MICHAEL F.,)	
)	
Defendants)	
Appellants.)	
AMMON, COLUSI)	
ASHBECK, LEO)	
BRITT, SIDNEY)	
COCHRAN, GLEN)	
CORREA, JOHN E.)	
CORREA, JOHN B.)	
GRAHM, DELBERT BUD)	
HALE BROS., INC.)	
HAWKINS, BOB)	
MADER, FRANK)	
MADISON RANCHES,)	
INC.)	
MADISON, JOHN)	
MCCARTY, MIKE)	
MYERS, JERRY)	
MUELLER, FRANK)	
PEDRO, FRANK)	
SCHILLER, ROBERT)	
WITHERRITE, WELDON)	

CHOWNING, GLEN)
WATTENBERGER, BURL)
)
Defendants)

The Court has considered the petition for review and ORDERS that it be denied.

DATED: JUNE 19, 1990.

/s/ Edwin J. Peterson
Edwin J. Peterson
Chief Justice

Graber, J. not participating

COPIES TO:

John C. Cahalan Attorney for:
Petitioner
Rives Kistler Attorney for:
Respondent

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

SAYLOR, LOWELL ET AL)	
OREGON TRAIL RANCHES,)	ORDER DENYING
INC., ALFALFA ACRES,)	RECONSIDERATION
INC.,)	
Plaintiffs)	CA A50953
Respondents.)	SC S37073
v.)	
WATER RESOURCES)	
DEPT., LADD,)	
MICHAEL F.,)	
Defendants)	
Appellants.)	
AMMON, COLUSI)	
ASHBECK, LEO)	
BRITT, SIDNEY)	
COCHRAN, GLEN)	
CORREA, JOHN E.)	
CORREA, JOHN B.)	
GRAHM, DELBERT BUD)	
HALE BROS., INC.)	
HAWKINS, BOB)	
MADER, FRANK)	
MADISON RANCHES,)	
INC.)	
MADISON, JOHN)	
MCCARTY, MIKE)	
MYERS, JERRY)	
MUELLER, FRANK)	
PEDRO, FRANK)	
SCHILLER, ROBERT)	
WITHERRITE, WELDON)	

CHOWNING, GLEN)
WATTENBERGER, BURL)
)
Defendants)

The Court of Appeals has considered the Petition for Review filed in this case as a Petition for Reconsideration and has, on May 16, 1990, denied the petition. ORAP 9.15. The Supreme Court may now proceed to determine whether to grant review. The appellate court decision is not enforceable until the Supreme Court has completed its review of the petition. ORAP 14.05.

/s/ George M. Joseph
CHIEF JUDGE

Copies to:

John C. Cahalan	Attorney for:
	Respondent
Rives Kistler	Attorney for:
	Appellant

IN THE COURT OF APPEALS OF
THE STATE OF OREGON

LOWELL SAYLOR, OREGON
TRAIL RANCHES, INC. and
ALFALFA ACRES, INC., Respondents,

v.

STATE OF OREGON WATER
RESOURCES DEPARTMENT;
MICHAEL F. LADD, WATERMASTER,
DISTRICT 5, OF THE STATE OF
OREGON WATER RESOURCES
DEPARTMENT, Appellants,

and

COLUSI AMMON; LEO
ASHBECK; SIDNEY BRITT;
GLEN COCHRAN; JOHN E.
CORREA; JOHN B. CORREA;
DELBERT BUD GRAHAM;
HALE BROS., INC., an
Oregon corporation; BOB
HAWKIN ; FRANK MADER;
MADISON RANCHES, INC.,
an Oregon corporation;
JOHN MADISON; MIKE
McCARTY; JERRY MYERS;
FRANK MUELLER; FRANK
PEDRO; ROBERT SCHILLER;
WELDON WITHERITE; GLEN

CHOWNING and BURL
WATTENBERGER,

Defendants.

(CV-88-283; CA A50953)

Appeal from Umatilla County,
Circuit Court.

J.F. Olsen, Judge.

Argued and submitted January 29,
1990.

Rives Kistler, Assistant Attorney
General, Salem, argued the
cause for appellants. With him
on the briefs were Dave
Frohnmayr, Attorney General,
and Virginia L. Linder,
Solicitor General, Salem.

John C. Cahalan, Portland, argued
the cause for respondents.
With him on the brief was Dunn,
Carney, Allen, Higgins &
Tongue, Portland.

Before Graber, Presiding Judge, and
Riggs and Edmonds, Judges.

PER CURIAM

Reversed.

saylor.opn

FILED: March 14, 1990

PER CURIAM

Respondents are owners of land located in Umatilla County and of water rights in Butter Creek. Pursuant to a 1916 court decree, they are entitled to accumulate water to preserve their water rights. In 1988, appellants refused to allow accumulation of water until all water users had signed a use agreement. Respondents filed a complaint in circuit court requesting declaratory and injunctive relief under 42 USC § 1983 and ORS ch 28. They successfully obtained a preliminary injunction and, pursuant to 42 USC § 1988,¹ were awarded attorney fees, which is the subject of the appeal.

The right to use water is a vested property interest entitled to judicial protection. Skinner v. Jordan Val. Irr.

Dist., 137 Or. 480, 491, 300 P. 499, 3 P.2d 534 (1931). ORCP 79A(1)(b) provides an adequate state remedy for the protection of that interest. See also ORS 540.740.² Because respondents were entitled to relief that they sought under state law, their invocation of 42 USC § 1983 was unnecessary. Accordingly, the trial court erred in awarding respondents attorney fees under 42 USC § 1988. Oregon State Police Assn. v. State of Oregon, 308 Or. 531, 538, 783 P.2d 7 (1989).

Reversed.

FOOTNOTES

1

42 USC § 1988 states:

"In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

2

ORS 540.740 provides:

"Any person who may be injured by the action of any watermaster may appeal to the circuit court for an injunction. The injunction shall only be issued in case it can be shown at the hearing that the watermaster has failed to carry into effect the order of the Water Resources Commission or decrees of the court determining the existing rights to the use of water."

IN THE CIRCUIT COURT OF
THE STATE OF OREGON

FOR THE COUNTY OF UMATILLA

LOWELL SAYLOR,	)	Case No.
et al.,	)	CV-88-283
)	
Plaintiffs,)	
)	
v.)	
	)	ORDER ALLOWING
STATE OF OREGON	)	PLAINTIFFS'
WATER RESOURCES	)	MOTION FOR
DEPARTMENT,	)	AWARD OF
et al.,	)	ATTORNEY FEES
)	
Defendants.)	

On August 3, 1988, plaintiffs filed a motion for attorney fees pursuant to 42 U.S.C. § 1988.

After considering the motion and briefing and the statements of counsel at the hearing, the Court entered a Memorandum of Opinion dated October 4, 1988, ruling that plaintiffs' motion for attorney fees should be allowed. Plaintiffs' counsel subsequently filed a

statement of their allowable costs and attorney fees accompanied by an affidavit of plaintiffs' counsel itemizing these expenses. Based on the statement of costs and the affidavit of plaintiffs' counsel, the Court has determined that plaintiffs are entitled to judgment against the State of Oregon Water Resources Department pursuant to 42 U.S.C. § 1988 for attorney fees and costs in the sum of \$9,779.86. Furthermore, the Court has concluded that, in prevailing on their application for a preliminary injunction, plaintiffs obtained the practical equivalent of all the relief they were seeking in this case. For these results, the Court has concluded that the judgment for costs and attorney fees should contain a recital pursuant to Rule 67B of the Oregon Rules

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of Civil Procedure that there is no just reason for delay and that the judgment should be entered in the record forthwith.

IT IS SO ORDERED.

Dated this 15th day of December,
1988.

/s/ J.F. Olsen
J.F. OLSEN
CIRCUIT COURT JUDGE

Presented by:

John C. Cahalan, OSB #84151
Dunn, Carney, Allen,
Higgins & Tongue
851 S.W. Sixth Avenue, Suite 1500
Portland, Oregon 97205
(503) 224-6440

Attorneys for Plaintiffs

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IN THE CIRCUIT COURT OF
THE STATE OF OREGON
FOR UMATILLA COUNTY

LOWELL SAYLOR,)	
OREGON TRAIL	)	CV 88-283
RANCHES, INC.,)	
and ALFALFA ACRES,)	
INC.,)	
)	
Plaintiffs,)	
)	
v.)	
)	
STATE OF OREGON	)	Memorandum
WATER RESOURCES	)	of Opinion
DEPARTMENT; MICHAEL)	
F. LADD, WATER)	
MASTER, DISTRICT)	
5, OF THE STATE)	
OF OREGON WATER)	
RESOURCES)	
DEPARTMENT, et al.,)	
)	
Defendants.)	

The Water Resources Department asserts that Plaintiffs are not entitled to attorney fees under 42 U.S.C. 1988 because they have failed to establish a claim under 42 U.S.C. 1983. They say that plaintiffs are not denied procedural

due process because they are provided the right to a hearing under ORS 540.740 and 540.750.

These assertions fail, however, because ORS 540.740 provides for a hearing for injunctive relief by "(a)ny person who may be injured by the action of the watermaster." Emphasis supplied.

In this action plaintiffs were already injured by the action of the watermaster. They were told under paragraph 7 of the distribution plan that their accumulated water rights would not be recognized until they signed the plan. This restriction was imposed after the starting date for plaintiffs' accumulated water rights and drought conditions exacerbated the situation. Thus, plaintiffs were in fact denied

their accumulated water rights from January 19, 1988 until March 21, 1988.

This court's opinion was that the watermaster's plan was an unauthorized deprivation of plaintiffs' water rights. Those rights were property interests thus plaintiffs were denied substantive due process under the U.S. Constitution.

Attorney fees are allowed pursuant to 42 U.S.C. 1988.

DATED this 4th day of October, 1988.

s/ J.F. Olsen

J.F. OLSEN

Circuit Judge

JFO/dm

cc John C. Cahalan
Robert A. Petersen

CIRCUIT COURT OF OREGON

Judge J.F. Olsen
Sixth Judicial District
P.O. Box 547
Pendleton, Oregon 97801

May 13, 1988

Addressees below:

Re: Saylor v. Water Resources Dept.,
CV 88-283

However necessary it was for the Water Resources Department to fashion a workable agreement the procedure they followed was to suggest that the users either agree or else face the ultimatum.

Paragraph 7 of the 1988 agreement has the effect of a unilateral modification of the 1916 decree and was imposed after the starting date for accumulation rights. This forfeiture provision has no basis for validity within the decree which specifically provided that no system could interfere with prior existing rights which have already been established.

Although the Water Resources Department has the authority to implement a plan upon agreement of two or more users they may not do so to the detriment

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of the existing rights of other users who do not agree.

A preliminary restraining order and injunction will issue. Bond is set at \$20,000 unless the parties agree to a different amount.

J.F. OLSEN
Circuit Judge

JFO/dm

Addressees:

John C. Cahalan
Robert A. Petersen

cc: Official File

IN THE CIRCUIT COURT OF
THE STATE OF OREGON

FOR THE COUNTY OF UMATILLA

LOWELL SAYLOR, OREGON)
TRAIL RANCHES, INC.)
and ALFALFA ACRES, INC.,)
Plaintiffs)

v.)

STATE OF OREGON WATER)
RESOURCES DEPARTMENT;)
MICHAEL F. LADD,)
WATERMASTER, DISTRICT 5,)
OF THE STATE OF OREGON)
WATER RESOURCES)
DEPARTMENT; COLUSI AMMON;)
LEO ASHBECK; SIDNEY)
BRITT; GLEN COCHRAN;)
JOHN E. CORREA;)
JOHN B. CORREA; DELBERT)
BUD GRAHM; RALE BROS.,)
INC., an Oregon corpor-)
ation; BOB HAWKINS;)
FRANK MADER; MADISON)
RANCHES, INC., an Oregon)
corporation; JOHN)
MADISON; MIKE McCARTY;)
JERRY MYERS; FRANK)
MUELLER; FRANK PEDRO;)
ROBERT SCHILLER; WELDON)
WITHERRITE, GLEN)
CHOWNING and BURL)
WATTENBERGER,)

Defendants.)

Case No.
CV-88-283

PRELIMINARY
INJUNCTION

Plaintiffs Lowell R. Saylor, Oregon Trail Ranches, Inc. and Alfalfa Acres, Inc. have filed an application for a preliminary injunction directed to defendants State of Oregon Water Resources Department and Michael F. Ladd ("State Defendants"). The application was presented in open court on May 12, 1988. Plaintiffs appeared by their attorney, John C. Cahalan. State Defendants appeared by their attorney, Robert A. Petersen.

Having considered the statements of counsel and the evidence presented at the May 12, 1988 hearing, and being duly advised, the Court has determined that a preliminary injunction should be entered in this case against the State Defendants to the extent set forth in this order.

A preliminary injunction is warranted under Rule 79 of the Oregon Rules of Civil Procedure because it appears at this time that plaintiffs are entitled to the relief they request pursuant to the second claim for relief of their complaint, which relief consists of restraining the continuance of conduct that will produce injury to plaintiffs during the pendency of this litigation, and because it appears that the State Defendants are presently engaged in conduct in violation of plaintiffs' decreed water rights concerning the subject matter of this case, which conduct, if allowed to continue, would render ineffectual any eventual judgment in favor of plaintiffs.

This case concerns the irrigation method known as "accumulation" as it is

practiced in Butter Creek, a tributary of the Umatilla River. At the hearing, plaintiffs contended that, under the existing water-rights decree of this court and as a matter of long-established custom and practice, their accumulation rights for this irrigation season should have taken effect not later than February 11, 1988. The State Defendants contended that they were not obligated to afford accumulation rights to plaintiffs until such time as plaintiffs signed a written distribution plan for the 1988 irrigation season in Butter Creek. After considering all the evidence and argument presented at the hearing, it appears to the Court that plaintiffs are entitled to be afforded accumulation rights in 1988 with an effective date of February 11, 1988 and that plaintiffs will sustain

irreparable harm in the form of presently incalculable crop losses unless they are afforded the relief provided in this order. It further appears that plaintiffs are likely to prevail on the merits with respect to their claim for permanent injunctive relief.

Accordingly, the Court now orders as follows pursuant to Rule 79 of the Oregon Rules of Civil Procedure:

1. Defendants State of Oregon Water Resources Department and Michael F. Ladd, Watermaster of the State of Oregon Water Resources Department, are hereby ordered to afford accumulation for plaintiffs and for each of the defendant water-users effective February 11, 1988 for the 1988 irrigation season.

2. Except as otherwise provided in this Order, all other terms and

provisions of the irrigation plan known as the "Butter Creek Distribution Plan for 1988" ("Plan") shall remain in full force and effect.

3. In accordance with the directions of this Court, defendants State of Oregon Water Resources Department and Michael F. Ladd, Watermaster of the State of Oregon Water Resources Department, are hereby ordered to make reasonable efforts to determine who received water from Butter Creek after February 10, 1988 and before February 19, 1988 and to adjust their accumulation rights in accordance with the Plan based upon their usage during that period of time.

Plaintiffs shall post a bond in the sum of \$20,000 within five (5) days after the date of this order.

IT IS SO ORDERED.

DATED this 17th day of May, 1988.

/s/ J.F. Olsen
Umatilla Circuit Court Judge

PRESENTED BY:

John C. Cahalan
DUNN, CARNEY, ALLEN, HIGGINS & TONGUE
851 S.W. Sixth Avenue, Suite 1500
Portland, Oregon 97204
Telephone: (503) 224-6440

Attorneys for Plaintiffs

IN THE CIRCUIT COURT
OF THE STATE OF OREGON

FOR THE COUNTY OF UMATILLA

LOWELL SAYLOR, OREGON)
TRAIL RANCHES, INC.)
and ALFALFA ACRES, INC.,)
Plaintiffs)

v.)

STATE OF OREGON WATER)
RESOURCES DEPARTMENT;)
MICHAEL F. LADD,)
WATERMASTER, DISTRICT 5,)
OF THE STATE OF OREGON)
WATER RESOURCES)
DEPARTMENT; COLUSI AMMON;)
LEO ASHBECK; SIDNEY)
BRITT; GLEN COCHRAN;)
JOHN E. CORREA;)
JOHN B. CORREA; DELBERT)
BUD GRAHM; RALE BROS.,)
INC., an Oregon corpor-)
ation; BOB HAWKINS;)
FRANK MADER; MADISON)
RANCHES, INC., an Oregon)
corporation; JOHN)
MADISON; MIKE McCARTY;)
JERRY MYERS; FRANK)
MUELLER; FRANK PEDRO;)
WILLAMETTE PRODUCTION)
CREDIT ASSOCIATION IN)
LIQUIDATION; ROBERT)
SCHILLER; WELDON)

Case No.
CV-88-283

AMENDED
COMPLAINT
FOR
DECLARATORY
JUDGMENT AND
INJUNCTION

WITHERITE, GLEN)
CHOWNING and BURL)
WATTENBERGER,)
)
Defendants.)

Plaintiffs allege:

PARTIES AND JURISDICTION

1.

Plaintiff Lowell R. Saylor is a citizen and resident of the State of Oregon and, at all material times, has been the owner of certain agricultural real property in Umatilla County, Oregon, together with the concomitant water rights. Plaintiff Alfalfa Acres, Inc. is an Oregon corporation with its principal place of business in the State of Oregon and, at all material times, has been the owner of certain agricultural real property located in Umatilla County, Oregon, together with the concomitant

water rights. Plaintiff Oregon Trail Ranches, Inc. is an Oregon corporation with its principal place of business in the State of Oregon and has used the above-referenced real property in consideration for transferring to the owners a portion of the annual crop yield of the property.

2.

Defendant State of Oregon Water Resources Department ("Department") is a department of the government of the State of Oregon. Defendant Michael F. Ladd ("Watermaster") is a citizen and resident of the State of Oregon and, at all material times, has been a person employed by the Department as a Watermaster within the meaning of Oregon Revised Statutes § 540.020. The other named defendants have been joined as

defendants herein solely to enable them to assert their interests, if any, in the controversy.

3.

This case presents an actual controversy within the jurisdiction of this court, such that declaratory relief and corresponding injunctive relief are warranted under ORS 28.010, et seq.

STATEMENT OF CLAIMS

First Claim for Relief:

Request for Declaratory Judgment

4.

The agricultural productivity of plaintiffs' real property is dependent upon the application of irrigation water derived from Butter Creek and Five Mile Creek, which are natural surface public water sources. Pursuant to Oregon Revised Statutes § 540.045, the

Department and the Watermaster are required to regulate the distribution of water from Butter Creek and Five Mile Creek in accordance with plaintiffs' existing water rights of record in the office of the Department and as set forth in related court decrees.

5.

The records of the Department include and acknowledge the Butter Creek Decree of the Circuit Court of Umatilla County dated September 9, 1916, which affirmed and adopted in relevant part the Findings and Order of Determination of the Board of Control dated January 22, 1912. By the terms of the Butter Creek Decree, a water user is entitled: (1) to divert and use the water user's proportionate share of water at any time after the commencement of the annual

irrigation season when sufficient water is available in Butter Creek to satisfy the user's rights, and (2) to continue such use until the user has received the full entitlement of water for the season. As water users under the Decree, plaintiffs are also entitled to forego the early use of water and to divert and use water at a later time when it can be used more effectively for their property. This procedure is known as the right of "accumulation." Plaintiffs are entitled to exercise these rights of accumulation under the terms of the Findings and Order as adopted and affirmed by the Butter Creek Decree and by custom and usage which has been followed by the other water users and by the Department and its predecessors at least since the inception of the water

rights at issue in this case.

6.

The Department and defendant Watermaster exercise control over the distribution of water in Butter Creek. In that capacity, they have prepared an irrigation plan known as the "Butter Creek Distribution Plan" for 1988. Defendants have insisted that all water users in the Butter Creek distribution area, including plaintiffs, sign the Distribution Plan in order to exercise their accumulation rights in 1988.

7.

Paragraph 7 of the Distribution Plan provides that accumulation rights will not accrue until the agreement has been signed by all water users, and paragraph 6 of the Distribution Plan provides that accumulation rights will not be

recognized for water users who fail to execute the plan. As a result of these provisions, plaintiffs were faced with the intolerable choice of either (1) signing the plan and forfeiting previously accrued accumulation rights; or (2) refraining from signing the plan and thereby forfeiting their accumulation rights for the entire season. Plaintiffs signed the Plan on March 21, 1988 only after the Department agreed that this would not be asserted as a waiver of their right to litigate their entitlement to additional accumulation rights.

8.

The Department's and the Watermaster's refusal to recognize the accumulation rights that accrued to plaintiffs prior to March 21, 1988 constitutes a taking of plaintiffs'

property without just compensation and a denial of plaintiffs' property rights without due process of law, all in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

9.

The foregoing refusal to recognize plaintiffs' accumulation rights also constitutes a violation of the Department's and the Watermaster's obligations and duties to plaintiffs under the terms of the decree.

10.

Plaintiffs' accumulation rights also arise as a matter of private contract between plaintiffs and the other water users exercising rights under the Butter Creek Decree. The denial of plaintiffs' accumulation rights therefore amounts to

an impairment of contractual obligations in violation of Section 10 of Article I of the Constitution of the United States.

11.

In denying plaintiffs' accumulation rights, the Department and the Watermaster have acted under color of the laws, regulations, customs or usages of the State of Oregon in violation of plaintiffs' rights, privileges and immunities secured by the Constitution and laws of the United States. Plaintiffs are therefore entitled to secure redress of these rights pursuant to 42 U.S.C. § 1983.

12.

Because this is an action or proceeding to enforce the provisions of 42 U.S.C. § 1983, plaintiffs would be entitled to an award of their reasonable

attorney fees pursuant to 42 U.S.C. § 1988 should they prevail in this action.

Second Claim for Relief:

Request for Preliminary and Permanent Injunctive Relief

13.

Paragraphs 1 - 12 are realleged.

14.

Plaintiffs have no adequate remedy at law to redress the violations alleged herein. The agricultural productivity of plaintiffs' real property will be substantially impaired and irreparable harm will inevitably result unless defendants are restrained from abridging plaintiffs' accumulation rights.

WHEREFORE, plaintiffs pray for relief as follows:

1. On their first claim for relief,

a judgment and decree that defendants are not entitled to insist on a waiver of plaintiffs' accumulation rights as a condition to plaintiffs' participation in the 1988 distribution plan.

2. On their second claim for relief, an order and decree pursuant to ORS 28.080 restraining defendants from denying plaintiffs' accumulation rights.

3. An award of plaintiffs' reasonable costs and attorney fees pursuant to 42 U.S.C. § 1988 and such further relief as the Court may deem appropriate.

DATED this 3rd day of May, 1988.

DUNN, CARNEY, ALLEN,
HIGGINS & TONGUE

By: /s/ John C. Cahalan
John C. Cahalan
Attorneys for Plaintiff

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1990

LOWELL SAYLOR, et al.,

Petitioners,

vs.

STATE OF OREGON, OREGON DEPARTMENT OF
WATER RESOURCES, and MICHAEL F. LADD,
WATERMASTER, DISTRICT 5, OF THE STATE
OF OREGON WATER RESOURCES DEPARTMENT,

Respondents.

AFFIDAVIT OF MAILING
PETITION FOR CERTIORARI

STATE OF OREGON)

: ss.

County of Multnomah)

George J. Cooper, III, being duly
sworn, deposes and says:

I am a member of the Bar of the Supreme Court of the United States.

On September 17, 1990, at approximately _____ p.m., I deposited in the mailbox at the Main Office Station, 715 N.W. Hoyt Street, Portland, Oregon, an envelope addressed to the Clerk of the Supreme Court of the United States, first-class postage prepaid, containing 40 copies of the petition for certiorari in the above-entitled case.

George J. Cooper, III
Counsel of Record
851 S.W. Sixth Avenue, Suite 1500
Pacific First Federal Building
Portland, Oregon 97204-1357
(503) 224-6440

Counsel for Petitioners

SUBSCRIBED AND SWORN to before me
this 17th day of September, 1990.

Notary Public for Oregon

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1990

LOWELL SAYLOR, et al.,

Petitioners,

vs.

STATE OF OREGON, OREGON DEPARTMENT OF
WATER RESOURCES, and MICHAEL F. LADD,
WATERMASTER, DISTRICT 5, OF THE STATE
OF OREGON WATER RESOURCES DEPARTMENT,

Respondents.

CERTIFICATE OF SERVICE

I, George J. Cooper, III, a member
of the Bar of this Court, hereby certify
that on this 17th day of September, 1990,
three copies of the Petition for Writ of
Certiorari in the above-entitled case
were mailed, first-class postage prepaid,
to the following listed persons
representing all parties to the

proceedings below who are not petitioners herein. I further certify that all parties required to be served have been served.

Solicitor General
Department of Justice
Washington, D.C. 20530

Rives Kistler
Assistant Attorney General
400 Justice Building
Salem, Oregon 97310
(503) 378-4402

Counsel for Respondents

George J. Cooper, III
851 S.W. Sixth Avenue, Suite 1500
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(503) 224-6440

Counsel for Petitioners

